149 U.S. 55-93

RECORD, CASE No. 13,662.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 108.

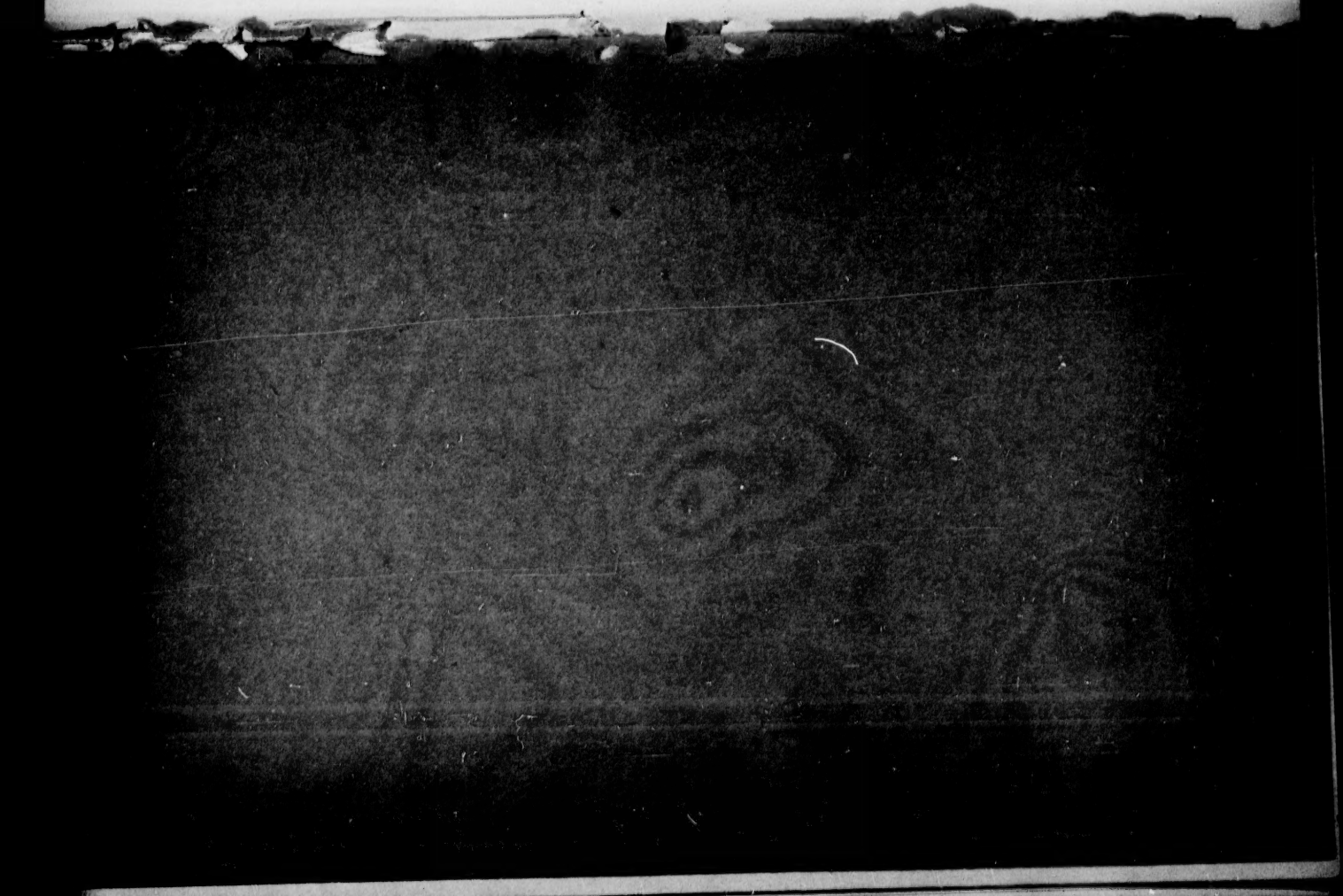
NICHOLAS S. HILL, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

FILED SEPTEMBER 28, 1889.



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INDEX.

	Original.	Print.
Caption	1	1
Petition	1	1
Exhibit A—Deed from Thomas Donaldson, trustee, to Nicholas S. Hill, February 14, 1873	3	2
Plat	6a	3
Pleas	7	4
Replication	8	4
Rejoinder	9	5
Withdrawal of replication to second plea, &c.	9	5
Opinion	9	5
Findings of the court	12	6
Conclusions of law	15	7
Judgment	16	7
Prayer for writ of error	16	7
Order for writ of error	16	7
Waiver of citation	16	7
Bond	17	7
Writ of error	19	9
Clerk's certificate	20	10

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 22, 1892.

1 UNITED STATES OF AMERICA, } *To wit:*
District of Maryland, }

At a circuit court of the United States for the fourth circuit in and for the district of Maryland, begun and held at the city of Baltimore on the first Monday of April, being the first day of the same month, in the year of our Lord one thousand eight hundred and eighty-nine—present, the Hon. Thomas J. Morris, judge Maryland district; Thomas G. Hayes, Esquire, attorney; George H. Cairnes, Esquire, marshal; James W. Chew, clerk—among other were the following proceedings, to wit:

NICHOLAS S. HILL }
vs.
THE UNITED STATES. }

Petition under the Act 1887, *Ch.* 359. *Filed* 1 *November*, 1888.

In the Circuit Court of the United States for the District of Maryland.

NICHOLAS S. HILL }
vs.
THE UNITED STATES OF AMERICA. }

To the honorable the judges of said court:

2 The petition of Nicholas S. Hill, a citizen of the United States and the State of Maryland, residing in Baltimore city, in said State, and within the district of Maryland aforesaid, respectfully represents—

1. That your petitioner, since the fourteenth day of February, 1873, has been seized and possessed in fee simple of certain tracts of land situated in Baltimore county, in the State of Maryland, fronting upon the Chesapeake bay, with all the riparian rights attached thereto under the laws of this State, of which a plat and description is filed herewith as part of this petition and marked Exhibit A.

2. Your petitioner further states and avers that since his acquisition of said land, with said riparian rights attached thereto, a valuable part thereof has been used and occupied by the United States Government in the manner hereinafter described, without any compensation to your petitioner for such use and occupation and without the consent thereto of your petitioner or his predecessors in title.

3. That the manner of use and occupation so complained of is the erection and maintenance of a light-house known generally as the Miller's Island light-house.

4. And your petitioner avers by the use and occupancy by the Government as aforesaid of his property he has been prevented from using the same within the limits above mentioned, and from erecting buildings thereupon and using the same for fishing and gunning purposes.

5. And your petitioner claims as damages for the use and
3 occupation of his said property as aforesaid the sum of $9,999.00 from the first day of November, 1885, until the first day of November, 1888, and prays the judgment and decree of this honorable court thereupon upon the facts and the law.

N. S. HILL.

J. ALEXANDER PRESTON,
Attorney for Petitioner.

BALTIMORE CITY, *To wit:*

Before the subscriber, a commissioner of the United States for the district of Maryland, personally appeared this first day — November, 1888, Nicholas S. Hill, the plaintiff in the above cause, and made oath in due form of law that he has caused a copy of this petition, filed by him in the above cause, to be served on Thomas G. Hayes, and also mailed a copy of said petition by registered letter to the Attorney General of the United States, as by the act of Congress of March, eighteen hundred and eighty-seven, is required.

GEORGE MORRIS BOND,
United States Commissioner for Maryland.

EXHIBIT "A."

This deed, made this fourteenth day of February, in the year one thousand eight hundred and seventy-three, by Thomas Donaldson, trustee, as hereinafter mentioned:

4 Whereas by a decree of the circuit court for Baltimore county, passed on the second day of November, in the year one thousand eight hundred and seventy, in the case of John H. Owings, executor of H. H. Owings, deceased, *vs.* Frederick Schumacher and others, the above-named Thomas Donaldson was appointed trustee to sell and convey the property thereby decreed to be sold, being the parcels of land hereinafter described, and in pursuance of such decree the said trustee, after having duly bonded and given the public notice required by said decree of the time, place, manner, and terms of sale, did sell to John H. Owings, executor as aforesaid, the said land for the sum of nine thousand and five hundred dollars, and afterwards, by order of the said court passed on the 11th day of January, 1872, Nicholas S. Hill was substituted as the purchaser in the place of said John H. Owings, executor as aforesaid, and the said Thomas Donaldson, trustee, was authorized to execute a deed thereof directly to said Nicholas S. Hill upon payment by him of the balance of purchase-money still due thereon, which amount has been fully paid to said trustee and the sale aforesaid duly reported to and finally ratified by said court:

Now, therefore, this deed witnesseth: That the said Thomas Donaldson, trustee as aforesaid, in consideration of the premises and of one dollar, doth, by virtue of the power and authority in him vested by the said court, grant unto the said Nicholas S. Hill all the right and title of all the parties to the aforesaid cause in and to all those

pieces or parcels of ground situate and lying in Baltimore
5 county and at the mouth of Back river, described as follows—that is to say, the one known as "Privilege" or "Worthington's" island, containing about two hundred and fifty acres, the other known as "Stanbury Adventure," or "Miller's island," containing two hundred and sixty-one acres of land, more or less, which parcels are described in a deed from Joseph Hart to S. F. Hart, dated the 12th August, 1822, and recorded among the land records of Baltimore county in Liber W. G. No. 165, folio 15, &c., and which, on the 13th November, 1856, were sold by James H. Bevans and Henry P. Brooks, trustees, to said Frederick Schumacher, and which sale, being duly reported to, was confirmed by the circuit court for Baltimore county, and a deed accordingly given on 23rd May, 1858, duly recorded among said land records in Liber G. H. C. No. 22, fol. 101, &c.

Also all that tract or parcel of land in said county comprising parts of the tracts of land called the "Isthmus of Darien" and "Watkins' Neck," or by whatsoever other names the same may be called, described in a deed from William H. Gatchell, trustee, dated 9th January, 1857, and recorded among the land records of Baltimore county in Liber H. M. F. No. 17, folio 492, &c., containing one hundred and twenty-seven acres and thirty-eight square perches of land, more or less, the whole being those pieces of land which by deed of mortgage dated 8th June, 1859, and recorded among the land records of Baltimore county in Liber G. H. C. No. 12, folio 117, &c., were conveyed to Henry H. Owings by Frederick Schumacher and wife, together with the improvements thereon
6 and the rights — appurtenances thereto belonging:

To have and to hold the property and premises above mentioned to be conveyed, with the rights and appurtenances aforesaid, unto the said Nicholas S. Hill, his heirs and assigns, in fee simple, to his and their proper use and benefit, free, clear, and discharged from all claim of the parties to the aforesaid cause, complainant and defendant, and those claiming by, from, or under them — either of them.

Witness the hand and seal of said trustee.

TH. DONALDSON, *Trustee.* [SEAL.]

Witness:

WM. H. BAYZAND.

STATE OF MARYLAND, *City of Baltimore,* } *ss:*

I hereby certify that on this fourteenth day of February, in the year one thousand eight hundred and seventy-three, before the subscriber, a justice of the peace of the State of Maryland in and for the city of Baltimore aforesaid, personally appeared Thomas Donaldson, trustee and grantor as named in the foregoing deed, and acknowledged the same to be his act.

Witness my name the day and year aforesaid.

WM. H. BAYZAND, *J. P.*

(Here follows diagram marked page 6*a*.)

7 *Pleas. Filed* 20 *April*, 1889.

In the Circuit Court of the United States for Maryland.

NICHOLAS S. HILL
vs.
THE UNITED STATES.

The United States, the defendant in this section, by Thomas G. Hayes, its attorney, for pleas to the petition of the petitioner filed in this cause says:

1. That the matters and things whereof the said plaintiff complains in his petition have heretofore been heard by this court, and by a good, valid, and subsisting judgment decided adversely to the said plaintiff.

2. That the land referred to and described in the petition filed in this cause is submerged land and part of the bottom of the Chesapeake bay, one of the navigable waters of the United States, and that the said defendant, under the law, for the purposes of a light-house, has a paramount right to its use as against the plaintiff or any other person.

3. That the defendant did not commit the wrongs alleged.

THOMAS G. HAYES,
U. S. District Attorney.

8 *Replication. Filed* 1 *June*, 1889.

In the Circuit Court of the United States for Maryland.

NICHOLAS S. HILL
vs.
THE UNITED STATES OF AMERICA.

The plaintiff as to the defendant's first plea says:

1. That the matters and things whereof the said plaintiff complains in his petition have not heretofore been heard by this court and have not been decided adversely to the said plaintiff by a good, valid, and subsisting judgment.

2. And as to the defendant's second plea says that the land referred to and described in the petition filed in this cause is not submerged land, and is not part of the bottom of the Chesapeake bay, one of the navigable waters of the United States, and that the defendant, under the law for the purposes of a light-house, has not a paramount right to its use as against the plaintiff or any other person.

3. And the plaintiff joins issue on defendant's third plea.

J. ALEXANDER PRESTON,
Att'y for Plaintiff.

9 *Rejoinder. Filed* 1 *June*, 1889.

In the Circuit Court of the United States.

NICHOLAS S. HILL
vs.
THE UNITED STATES.

The defendant in this action, by Thomas G. Hayes, its attorney, says by way of rejoinder to the plaintiff's 1st and 2nd replication:

1st. That it joins issue on the plaintiff's first replication.

2nd. And that it joins issue on the plaintiff's 2nd replication.

THOMAS G. HAYES,
U. S. Att'y.

Thereupon, on motion and by leave of the court, the plaintiff, by his attorney, withdraws his replication to the defendant's second plea and demurs thereto, and the defendant joins issue on the demurrer.

Opinion of the Court. Filed 22 *June*, 1889.

In the Circuit Court U. S.

HILL
vs.
UNITED STATES.

BOND, *Ct. Judge:*

10 This is an action for use and occupation of plaintiff's land.

The facts of the case are that on the 14th day of February, 1873, the plaintiff became the owner in fee of an island on the western side of the Chesapeake bay, known as Miller's island. In the year 1862 the State of Maryland granted by statute to the owners of all lands bounding on the navigable waters of the State the lands of the State covered by water in front of such shores to the deep water or channel of the navigable waters.

The United States, in 1874, for the purposes of the proper navigation of the Chesapeake bay, erected on the lands covered by water of the bay and within 200 yards of plaintiff's island a light-house known as Rear Range light of Craighill channel. The water covering the land on which the light-house is built is within the ebb and flow of the tide, and is about two feet deep at low tide. The plaintiff claims that the land upon which the light-house is built belongs to him by virtue of his deed and the statute of Maryland referred to, and that private property cannot be lawfully taken for a public use by the defendant without just compensation.

It is true that after the authority of Great Britain had been overthrown by the States all the property of the sovereign or of the lords proprietary belonged to the State; but the State of Maryland, when she ratified the Constitution of the U. S. and became a mem-

ber of the Federal Union, held the lands under her navigable waters subject to the conditions of that instrument. The Constitu-
11 tion provides that Congress shall have power to regulate commerce between the States and with foreign nations, and it has long been held that the power to regulate commerce carries with it the power to build light-houses and do all other necessary things, without which commerce cannot be successfully carried on. When the State of Maryland yielded this power to the United States she held the lands beneath the navigable waters *sub modo* only. They are subject to the right of the United States to use them in the regulation of commerce, as much so as the navigable waters themselves are under the control of the Federal Government, upon which she may fix a light-boat certainly and anchor it permanently to the bottom. When, therefore, the State granted the riparian privileges mentioned in the statute referred to she could grant no more than she possessed, and the plaintiff holds them subject to the right of the U. S. to regulate commerce as the State did. This light-house is, in the determination of Congress, necessary for the commerce or navigation of the Chesapeake; was within their power to build ever since the adoption of the Federal Constitution, and the plaintiff has no claim for the use and occupation of the premises.

Morris, district judge, concurred.

12 *Findings of the Court. Filed 27th June,* 1889.

In the Circuit Court of the U. S. for the District of Maryland.

NICHOLAS S. HILL
vs.
THE UNITED STATES.

Action at law for use and occupation.

J. Alexander Preston & Alexander Preston for plaintiff; Thomas G. Hayes, U. S. attorney, for defendant.

On the 1st November, 1888, the plaintiff filed his petition in this court, under the provisions of the act of Congress of March 3rd, 1887, chapter 359, in which he seeks to obtain compensation from the United States for the use and occupation of the site of Miller's Island light-house, which was built by the United States, in the year 1874, on the bottom of the Chesapeake bay, one of the public navigable waters of the United States, at about 200 yards from the shore of Miller's island, this light-house having been, ever since its construction, used as the rear range light of Craighill channel, the same being a channel constructed by the United States in the Chesapeake bay and used by ocean vessels in their approach to the port of Baltimore.

The plaintiff, in the year 1873, became, by purchase, the
13 owner of Miller's island, the same being an island in the Chesapeake bay, near its western shore.

The claim of the plaintiff to compensation for the use of the

site is based on his riparian rights as the owner of the fast land of Miller's island, which lies adjacent to the site in question, and he relies on a law of the State of Maryland, known as act 1862, chapter 129, to support his claim.

The United States resists this claim of the plaintiff upon the ground that his riparian rights under the law of the State of Maryland are subordinate and subject to paramount rights of the United States, under the commercial clause of the Federal Constitution, article 1, section 8, to use the said site without condemnation or compensation to the plaintiff for the purposes of commerce and navigation.

Findings of Facts.

1. I find that copies of the plaintiff's petition were, in compliance with the requirements of the act of March 3rd, 1887, chapter 359, duly served on the United States district attorney and the Attorney General of the United States and said law in all respects complied with.

2. I find that the plaintiff, since the fourteenth day of February, 1873, has been seized and possessed in fee simple of the tract of land described in these proceedings and known as "Miller's island," and of all the riparian rights attached thereto, under the laws of the State of Maryland.

14 3. I find that no part of the fast land included in the deed of the plaintiff has been used or occupied by the United States, but that a site for the rear range light of Craighill channel, situated about 200 yards from the shore line of the plaintiff's land, has been occupied and used by the United States; that the said site is submerged land in the Chesapeake bay, one of the public navigable waters of the United States, and within the ebb and flow of the tide, and in water about two feet deep at low tide.

4. I find that Craighill channel is a channel in the Chesapeake bay constructed by the United States and used by ocean vessels in their approach to the port of Baltimore, and that the light-house constructed by the United States in the year 1874 on the site in question is an important and necessary aid to the navigation of said channel.

5. I find that the United States took possession of said site for the purpose of building the light-house in question without condemnation or the payment of any compensation to the plaintiff or any other person in the year 1874.

6. I find that the land of Miller's island belonging to the plaintiff was heretofore used, and is chiefly valuable on account of the gunning for geese, swan, and ducks and for the fishing privileges with nets, and that since the erection of the light-house adjoining the shore the value of the land has decreased greatly, and that plaintiff's testimony tended to show that said decrease is due to

15 the erection of said light-house, and that the island formerly rented for $3,000 per annum, but since the erection of the light-house the rent has decreased to $500 per annum.

Conclusions of Law.

That the legal title to the site of the light-house in question is in the State of Maryland, subject to the riparian rights of the plaintiff under the act of 1862, chapter 129, of the laws of Maryland.

That under article 1, section 8, of the Constitution of the United States, which provide that Congress shall have the power "to regulate commerce with foreign nations and among the States and with the Indian tribes," both the title of the State of Maryland and the riparian rights of the plaintiff are subject to the paramount right of the United States to use and occupy the site in question for the purposes of commerce, which includes navigation, without condemnation or compensation, the submerged land forming the site of the light-house being as to such a use by the United States public and not private property.

I therefore overrule the demurrer of the plaintiff to the second plea of the United States, and I do give judgment under said plea for the United States, with costs, to include what has been actually incurred for witnesses and for summoning the same and fees paid to the clerk of the court.

HUGH L. BOND, *C't Judge.*

16 *Judgment.*

22 June, 1889, demurrer to the second plea overruled and judgment for the United States, with costs. Defendant's costs, $13.15.

Prayer for Writ of Error. Filed 9 July, 1889.

In the Circuit Court of the United States, District of Maryland.

NICHOLAS S. HILL
vs.
THE UNITED STATES. } Action under Act of 1887, ch. 359.

The plaintiff in this case prays for a writ of error to the Supreme Court of the United States from the judgment of this court, and that citation issue thereon.

J. ALEXANDER PRESTON,
Att'y for Plaintiff.

Let the writ issue as prayed.

THOS. J. MORRIS, *Judge.*

Citation waived.

THOMAS G. HAYES,
U. S. Att'y.

17 *Writ of Error Bond. Filed 10 July,* 1889.

Know all men by these presents that we, Nicholas G. Hill and J. Alexander Preston, of Baltimore city, State of Maryland, are held

and firmly bound unto the United States of America in the full and just sum of three hundred dollars, current money, to be paid to the said United States or its certain attorney; to the payment of which, well and truly to be made and done, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated on this ninth day of July, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas lately, at a circuit court of the United States for the fourth circuit in and for the district of Maryland, in a suit depending therein between the said Nicholas S. Hill, plaintiff, and The United States, defendant, a judgment was rendered in favor of the said defendant; from which said judgment the said plaintiff has prayed and obtained a writ of error to the next term of the Supreme Court of the United States:

Now, the condition of the above obligation is such that if the said Nicholas S. Hill shall prosecute his said writ of error with effect and answer all costs that shall be adjudged against him in case he shall fail to make good his said plea, then the above obligation shall be void; otherwise to be and remain in full force and vir-

18 tue.

NICHOLAS S. HILL. [SEAL.]
J. ALEXANDER PRESTON. [SEAL.]

Signed, sealed, and delivered in presence of—
IRENE JOHNSON.

Endorsed: "Bond approved. Thos. J. Morris, judge."

19 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the district of Maryland, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Nicholas S. Hill, plaintiff, and The United States of America, defendant, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 9th day of July, in the year of our Lord one thousand eight hundred and eighty-nine.

The Seal of the Circuit Court, Maryland.

JAS. W. CHEW,
Clerk of the Circuit Court of the United States,
District of Maryland.

Allowed by—
HON. THOS. J. MORRIS, *Judge.*

[Endorsed:] Nicholas S. Hill *vs.* United States. Writ of error.

20 Thereupon it is ordered by the court here that a transcript of the record and proceedings in the plea aforesaid, with all things thereunto relating, be transmitted to the Supreme Court of the United States to be holden at Washington on the second Monday of October next; and the same is transmitted accordingly.

Citation waived. See endorsement on prayer for writ of error.

Certificate.

DISTRICT OF MARYLAND, *To wit:*

I, James W. Chew, clerk of the circuit court of the United States for the fourth circuit in and for the district of Maryland, do certify that the foregoing is a full and complete record of the proceedings and judgment of the said court in the therein-entitled cause.

In testimony whereof I hereto set my hand and affix the seal of the said circuit court on this twentieth day of July, A. D. 1889.

The Seal of the Circuit Court, Maryland.

JAS. W. CHEW,
Clerk of said Circuit Court.

Endorsed on cover: Case No. 13,662. Maryland C. C. U. S. No. 108. Nicholas S. Hill, plaintiff in error, *vs.* The United States. Filed September 28, 1889.

149 U.S. 93

Office Supreme Court U
FILED.
OCT 15 1892
JAMES H. McKENNE
CLER

IN THE

Supreme Court of the United States.

RECORD, CASE No. 13,662.

TERM No. 108. OCTOBER TERM, 1892

NICHOLAS S. HILL, Plaintiff in Error

vs.

THE UNITED STATES.

BRIEF OF PLAINTIFF IN ERROR.

J. ALEXANDER PRESTON,
ALEXANDER PRESTON,
Attorneys for Plaintiff in Error.

KING BROTHERS, PRINTERS, BALTIMORE.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 9th day of July, in the year of our Lord one thousand eight hundred and eighty-nine.

The Seal of the Circuit Court, Maryland.

JAS. W. CHEW,
Clerk of the Circuit Court of the United States,
District of Maryland.

Allowed by—
HON. THOS. J. MORRIS, *Judge.*

[Endorsed:] Nicholas S. Hill *vs.* United States. Writ of error.

20 Thereupon it is ordered by the court here that a transcript of the record and proceedings in the plea aforesaid, with all things thereunto relating, be transmitted to the Supreme Court of the United States to be holden at Washington on the second Monday of October next; and the same is transmitted accordingly. Citation waived. See endorsement on prayer for writ of error.

Certificate.

DISTRICT OF MARYLAND, *To wit:*

I, James W. Chew, clerk of the circuit court of the United States for the fourth circuit in and for the district of Maryland, do certify that the foregoing is a full and complete record of the proceedings and judgment of the said court in the therein-entitled cause.

In testimony whereof I hereto set my hand and affix the seal of the said circuit court on this twentieth day of July, A. D. 1889.

The Seal of the Circuit Court, Maryland.

JAS. W. CHEW,
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vs.

THE UNITED STATES.

BRIEF OF PLAINTIFF IN ERROR.

J. ALEXANDER PRESTON,
ALEXANDER PRESTON,
Attorneys for Plaintiff in Error.

KING BROTHERS, PRINTERS, BALTIMORE.

IN THE

Supreme Court of the United States.

RECORD, CASE No. 13,662.

TERM No. 108. OCTOBER TERM, 1892.

NICHOLAS S. HILL, Plaintiff in Error

vs.

THE UNITED STATES.

BRIEF OF PLAINTIFF IN ERROR.

This suit was instituted in the United States Circuit Court for the District of Maryland, under the Acts of March 3d, 1887, chapter 359, of the U. S. Statutes at large, all the requirements of the statute having been complied with. (Record, page 7.)

STATEMENT OF FACTS.

The plaintiff in error, in the year 1873, became the purchaser of an island known as "Miller's Island," situated in the Chesapeake Bay, near its western shore. This land was conveyed to the said plaintiff in error by a deed from Thomas Donaldson, trustee, set out at length on pages 2 and 3 of the Record, and the riparian rights attached thereto, were vested in the owner of the fast land by an Act of the State of Maryland, referred to particularly hereinafter. The United States, in 1874, erected a lighthouse known as Rear Range Light of Craighill Channel. This lighthouse was within 200 yards of the fast land belonging to the plaintiff

in error, and was below high water mark, the water being about two feet deep at low tide. This erection to a very great extent destroyed the value of the plaintiff's property, which was used chiefly for the purposes of gunning and fishing; before this lighthouse was erected, the island rented for $3,000 per annum, and since its erection, for $500 per annum. (6th Finding of Facts, Record, page 7.)

By the Act referred to above, allowing a citizen to sue the United States, this plaintiff sought to recover damages sustained by reason of this erection, as no compensation of any kind was ever awarded, nor was there any condemnation of this lighthouse site. The case was tried and decided on the second plea filed by the defendant, and demurred to by the plaintiff. (Record, pages 4 and 5.) The judgment of the Court being against the plaintiff, he sued out a writ of error to this Court.

I.

The learned Court below (Bond and Morris, J. J.) by overruling the demurrer to the second plea, decided that the United States had the paramount right to erect a lighthouse on the submerged land of navigable waters, without compensation or condemnation, and the only question presented to this Court is whether or not such right exists in the United States.

The question may be presented in a clearer and more convenient form, if considered under the following heads:

1st. The title of the plaintiff in error to the land in question, and his riparian rights thereto.

2d. The title of the United States thereto, under the clause of the Constitution in regard to the regulation of commerce.

I. The Title and Riparian Rights of the Plaintiff in Error.

Under the common law, which prevailed in England and the State of Maryland, before the latter became one of the United States, there was a distinction between land lying un-

der navigable waters and land lying under streams not navigable, and waters not affected by the ebb and flow of the tide. The former belonged to the sovereign as one of the prerogatives of the crown, and the latter to the owner of the adjoining fast land. After the authority of Great Britian was overthrown, the submerged lands under navigable waters belonged to the State in which they were situated, and the State had the power to lease out such lands to its citizens for the purposes of oyster culture, fishing, and other uses of a similar character; such rights, however, being subject to the use of the public for navigation.

Martin vs. Waddell, 16 Peters, 410.
Pollard, lessee, vs. Hagan, et al., 3 How. 212.

On page 230 of the latter case Mr. Justice McKinley says: "The shores of navigable rivers, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the States respectively."

The plainliff in error holds this island under a deed from Thomas Donaldson, trustee, and is entitled to all the riparian rights incident to the land, by virtue of an Act of the General Assembly of Maryland, Laws of Maryland, 1862, chapter 129. Under this Act he is entitled "to all accretion to said land, by the recession of said water, whether heretofore or hereafter formed or made by natural causes or otherwise, in like manner, and to the same extent as such right may or can be claimed by the proprietor of land bounding on water not navigable." And paragraph 38 of said Act further provides as follows: "The proprietor of land bounding on any of the navigable waters of this State is hereby declared to be entitled to the exclusive right of making improvements into the waters in front of his said land. Paragraph 39 further provides, "that no patent hereafter issued out of the land office shall impair or affect the rights of riparian proprietors." So that the plaintiff is deprived of the *exclusive right* of making improvements in front of his land by reason of this lighthouse. The Court of Appeals of Maryland, by a number of decisions, have

passed upon the construction to be given to this law. In Day vs. Day, 22 Md. Rep., on page 537, Judge Cochran says: "The common law distinction between navigable waters and rivers or streams not navigable, is founded on the difference of the rights to which they are respectively subject; the entire property of the former being vested in the public, while the latter below low water mark belong to riparian proprietors, although in some cases subject to a qualified public use. Rivers or streams within the ebb and flow of the tide, to high water mark, belong to the public, and in that sense are navigable waters; all the land below high water mark, being as much a part of the *jus publicum*, as the stream itself. The owners of adjacent ground had no exclusive right to such lands, nor could any exclusive right to their use be acquired, otherwise than by an express grant from the State. The Act of 1862 was *intended to invest these owners of contiguous lands* with rights *and privileges* not *recognized by the common law*, and to that end the first section declares that the proprietors of lands bounding on any of the navigable waters of this State, should be entitled to all accretions thereto, by the recession of water, whether before or thereafter, or made by natural causes or otherwise."

"The second clause goes further and not only vests such owners with the exclusive privilege of extending improvements from their lands into the water thereof, but declares that these rights and privileges shall pass to the respective owners of such lands as incident to their respective estates. Looking then to the general purpose disclosed by these affirmative provisions it is clear that the clause in the third section, prohibiting the issue of any patent of land covered by navigable water, should be so construed as to apply to all lands below high water mark, or in terms still more comprehensive, to embrace any lands, to which any of the rights and privileges by this Act could attach."

See also—Patterson vs. Gelston, 23 Md. 445.

Goodsell vs. Lawson, 42 Md. 362–366.

In the latter case on pages 363–4, it was decided that under this Act of 1862, the owners of land bounding on navigable water, were upon exactly the same footing with an owner of land bounding on water not navigable.

See also—Linthicum vs. Cone 64 Md. 452.

Therefore the title of the plaintiff to the riparian's rights is based upon this Act and the construction thereof by the Supreme Court of the State of Maryland.

We will proceed, therefore, to the second division, viz.:

II. The title of the United States to the land in question under the clause of the Constitution in regard to the regulation of commerce.

It was early determined by this Court, that the clause in the Constitution giving Congress the power to regulate commerce, necessarily carried with it the power to control and regulate navigation, including therein the placing of buoys, lightships and the erection of lighthouses, and such other aids and assistants to navigation as might be necessary and advantageous. This proposition is of course not controverted nor disputed by this plaintiff, but it is contended that this power does not extend further than the entire *control* of such erections and other appliances, as may be necessary to navigation; that is to say, the Lighthouse Board or whatever body or department, in which the authority for controlling such matters may be placed, shall determine where and in what manner such erections, &c., shall be placed, and decide what may be obstructions, and so remove them. The State of Maryland by accepting the Constitution, undoubtedly surrendered her right to the control or the regulation of commerce, and incidently thereto, the right of controlling navigation, to the General Government, whenever the latter chose to exercise such right, but in surrendering that power there was no intention of dedicating the bottoms of her navigable waters, and no title nor easement thereto was either conveyed or intended to be conveyed by such surrender; it was simply a dedication of her right to exercise the jurisdiction inherent in every

sovereignty, to foster commerce by making safe the navigation of shipping coming to her harbors. It was the use of water and not of land, that was given up. An examination of the decisions by this tribunal, upon the subject of riparian rights, will show, it is submitted, that the point has not been directly passed upon, but the most direct decision in point is unquestionably in favor of the plaintiff's contention. In the Court below the learned District Attorney cited in the brief used in this case.*

The cases relied on in that brief were as follows:

Gibbons vs. Ogden, 9 Wheat. 190.
Martin vs. Waddell, 16 Peters, 410.
Pollard vs. Hagan, 3 Howard, 230.
Gilman vs. Phila., 3 Wall. 713.
South Carolina vs. Georgia, 93 U. S. 4.
McCready vs. Va., 94 U. S. 391.
Pensacola T. Co. vs. W. U. Tel. Co., 96 U. S. 1.
Miss. River R. Boom Co. vs. Patterson, 98 U. S. 403.
Mobile vs. Kimball, 102 U. S. 691.
Hoboken vs. Pa. R. R. Co., 124 U. S. 656.
Williamette I. Bridge Co. vs. Hatch, 125 U. S. 12.

It was claimed on behalf of the United States that the above cases established the following propositions:

I. The ownership of the State in the soil under navigable waters is subservient to the public right of navigation, the regulation of which as to certain commerce has been surrendered by the States to the United States. This soil can not be used so as to interfere with this right, the regulation of which as vested in the United States is exclusive, plenary and paramount.

* *Note*—It should be said that the brief used in this case was the same as filed in the case of Thomas C. Chappell vs. James M. Wateworth, tried in the Circuit Court for the District of Maryland, and the same authorities cited and relied upon in this case as were used in that case.

II. This public right is an easement on the title of the State, and its grantees in the land, enforceable by the United States; and for the enjoyment of such easement, such erections may be made by the United States as are necessary for the beneficial use of the easement in question.

III. These submerged lands, with the waters, are public property and not private property, and when the United States needs any of these lands for purposes of commerce or navigation, it can take them without condemnation or compensation, either to the State or its grantees.

It was decided by the lower Court, upon the cases above cited, that these propositions rightly stated the law.

As has been seen before, we admit that the States, by accepting the Constitution, surrendered their right to control navigation; that is to say, the State gave up its power to erect lighthouses, remove obstructions, to the general government, whenever the latter should use it.

As to the second proposition contained in the said brief, it is respectfully submitted that no easement of any kind was either conveyed or intended to be given by the State, in *lands* under navigable waters—*a right to regulate such erections, buoys* and *similar aids to navigation* as might be necessary, was granted to the United States by the States, but nothing more; this right was simply the power to determine where lights should be maintained, buoys anchored, channels dredged, the regulation of lights on vessels, and other regulations conducive to the safety of shipping and the fostering of commerce. But this right constituted no easement upon the soil under the waters, if an easement at all, it was one relating and applying to the waters alone, and not to land under them; and though it might be that the owner of the submerged land could not use his land in such a way as to interfere with this easement. nevertheless, the United States is without the power to deprive the owner of such land of his property, except in the manner prescribed in the Constitution for taking private land for public purposes.

The third proposition states that these lands are public and not private property, and can be taken for the purposes of commerce or navigation, without condemnation or compensation.

The learned District Attorney further says in his brief that these propositions were firmly established by the cases heretofore mentioned. But the facts of those cases were quite different from those of the present case, and the principle in controversy here was not passed upon.

Gibbons vs. Ogden, 9 Wheat. 190, was a case where the State of New York granted the exclusive right to one or two persons, to navigate with steam vessels, the navigable streams within the State, for a period of five years; this Court held, however, that this law, as far as vessels licensed by the United States were concerned, was unconstitutional, as the power to regulate commerce included also the right to control and regulate navigation. There is nothing whatever said or intimated in this case, beyond the fact that the United States has supreme power over the regulations of commerce with foreign nations.

Again, in the case of Martin vs. Waddell, 16 Peters, 367, where a question arose as to the right of several parties to one hundred acres of land lying under the navigable waters of Raritan Bay; one party claimed under letters patent granted under the proprietors of the province, and the other by virtue of a grant from the State of New Jersey. The Court held, that after the Revolution, the submerged lands were vested in the State, subject only to such rights as may have been surrendered to the United Government; there is not a word in that case intimating that any title or right was conveyed to the United States, in such land.

In Pollard vs. Hagan, 3 How. 230, the chief point decided was that States admitted into the Union after the adoption of the Constitution, were entitled to the same sovereignty over the lands under navigable waters, as the original States; and, upon page 230, Mr. Justice McKinley says: "The shores of navigable rivers and the soils under them were not granted by the Constitution to the United States,

but were reserved to the States respectively;" and it should be observed that in a number of the cases heretofore referred to, that a number of the judges, in giving the opinions of the Court, speak of the *shores* and submerged land together, evidently considering both as a similar kind of property and consequently subject to the same laws and regulations.

The case of Gilman vs. Phila., 3 Wall. 713, also cited in the brief referred to, presented a totally different set of facts from those of the present case. In that case Gilman attempted to enjoin the erection of a bridge over the Schuylkill river, a navigable stream lying entirely in the State of Pennsylvania, but the Court held that in a case where no action had been taken by Congress, the State for some purposes had plenary power to erect bridges and such obstructions as should further the interests of their own citizens.

The case of South Carolina vs. Georgia, 93 U. S. 4, was a case where the State of South Carolina endeavored to enjoin the Secretary of War and the United States Engineers from closing up one branch of the Savannah river; above the city of Savannah the river is divided into two channels, northern and southern channels; and in order to improve the harbor of Savannah, it was determined to close the northern channel, and thereby increase the depth of water, and the scouring effect of a more rapid current; this was accomplished by placing a dam across the northern channel. The bill filed sought to enjoin the obstruction or interruption of the navigation of Savannah river. The Supreme Court held that the power of *navigation* for the purposes of commerce was paramount and plenary in the United States Government, that this improvement was for the benefit and use of commerce and navigation. But there was no contention that the property rights of South Carolina were involved in any way, and no pretence of any apprehended damage inflicted. The injunction was asked for on the ground that her interests might be injuriously affected; and Mr. Justice Strong says, in concluding his opinion, page 14: "But in resting our judgment upon this ground, (viz., that the plain-

tiff had made no case, on the facts, justifying an injunction,) we are not to be understood as admitting that a State when suing in this Court for the prevention of a nuisance in a navigable river of the United States must not aver and show that it will sustain *some special* and *peculiar* injury therefrom, such as would enable a private person to maintain a similar action in another Court." So that although the language in this case is somewhat broader and more comprehensive than the cases before referred to in asserting the paramount control of the general government over navigable waters, and the regulation of commerce, it asserts in fact nothing more than the previous cases upon the subject, deciding that the United States has the absolute power, as against the States, of facilitating and improving navigation for the purposes of commerce.

So in McCready vs. Virginia, 94 U. S. 391, the precise point determined was that a State owned the soils under her waters, and could prohibit the citizens of other States from planting oysters in such soil, at the same time her own citizens had such right. Speaking of this right, Mr. Chief Justice Waites, used the following language: "The planting of oysters in the soil covered by water owned in common by the people of the State, is not different in principle from that of planting corn upon dry land held in the same way. Both are for the purposes of cultivation and profit, and if the State, in the regulation of its public domain, can grant to its own citizens the exclusive use of dry land, we see no reason why it may not do the same thing in respect to such as are covered by water."

Pensacola T. Co. vs. W. U. Tel. Co., 98 U. S. 403, simply decides that telegraph lines running from one State to another come within the clause of the Constitution relating to commerce. The quotation in the brief from the opinion upon the statute relating to military and post roads, "and over, under or across navigable streams or waters of the United States," is qualified by the sentence: "These are all within the domain of the National Government to the extent

of the national powers. For the question at issue in this case is in regard to the *extent* of that power, and nothing said in that case applies to this.

The Miss. River R. Boom Co. vs. Patterson, 98 U. S. 403, is the next case relied upon by the District Attorney, and he urgently insisted that this case should control the present one. The facts of that case were as follows: The Boom Co. had a charter from the State of Minnesota, giving them the right to erect a boom in the Mississippi river, and in order to exercise the rights granted under their charter, they condemned an island owned by one Patterson, claiming that no one could build a boom on the river, except the company under its charter. The Supreme Court rejected this view, and decided that the paramount control of the river was in the United States, that is as far as navigation was affected, but this decision did not concern the appropriation of the submerged soil under the river, particularly where that soil has become private property. And it can not be successfully contended that if the soil under this river had been granted to the owners of the adjacent banks, and the said owners had constructed a boom (such as described in said case) that the United States could grant a license to anyone else or interfere in any way, unless such booms should be obstructions to navigation.

The case of Mobile vs. Kimball, 102 U. S. 691, presents a totally different question from the present case, simply reiterating in substance, the right of a State to improve its harbor facilities in the absence of legislation by Congress.

The case of Hoboken vs. Pa. R. R. Co., 124 U. S. 656, goes no further than to reaffirm the right of navigation included in the commercial clause.

And, Williamette I. Bridge Co. vs. Hatch, 125 U. S. 12, decides the same question as that which arose in Gilman vs. Phila.

While all these cases maintain the right of absolute control over the waters of the United States, that are navigable and used or may be used for commerce, none go

so far as to the extent claimed in this case; and while it is not for a moment denied or controverted that the necessities, and perhaps the very existence, of commerce, require that all control of navigation should be placed in the National Government, it is respectfully submitted that this power does not permit its taking the private property of a citizen without compensation for any purpose, nor does it sanction the right to destroy the value of property without any authority further than an Act of Congress. In all the cases cited there were none where private rights were directly in controversy or where such rights had been directly injured and destroyed, as in the present case. Can the United States Government for example, build a breakwater in the harbor of a city, for the purpose of facilitating navigation and thereby cause such an overflow of water as might swamp the whole lower part of such city, destroying wharves, docks and other property, without compensating the owners for such loss? It has no more power or right to destroy the property now in question, than it has to flood a city. Is the power granted by the States of such an unlimited character that the unfortunate owner of land bordering upon navigable waters may be at any time utterly ruined, at the discretion of the lighthouse board? That such power was never intended to be vested in the General Government by the Constitution, is plainly shown by other sections of that instrument.

The fifth article of the amendments to the Constitution, provides that private property shall not be taken for public use without just compensation. If there was nothing in the Constitution and amendments thereto, providing for the use of private property for public use, in a case like the present, the commercial clause might be stretched to cover such a case with some reason, but when such a case has been expressly provided for, it is respectfully submitted, that the taking of this land is entirely unwarranted.

The case of Yates vs. Milwaukee, 10 Wall. 497, bears most directly upon the case at bar. The facts of that case were as follows: In the year 1856, a certain Shepardson

was the owner of a lot in Milwaukee, fronting upon the Menomonee and Milwaukee rivers, and he conveyed this lot, with the rights and privileges of building wharves, docking, &c., on the Milwaukee river; between the fast land and the navigable channel, was a space covered more or less with water; on this land Yates built a wharf for the purpose of reaching the navigable channel, and the city sought to remove it, as an obstruction to navigation, and as a nuisance, without condemnation or compensation. This Court held that this could not be done; and on page 504, Mr. Justice Miller says: "But whether the *title* of the owner of such a lot extended beyond dry land or not, he is certainly entitled to the rights of a riparian proprietor, whose land is bounded by a navigable stream; and among those rights are access to the navigable part of the river from the front of his lot, the right to make a landing, wharf or pier for his own use or for the use of the public, subject to such general regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever those may be. This proposition has been decided by this Court in the case of Dutton vs. Strong, and The R. R. Co. vs. Schunnier, just cited. The Supreme Court of Wisconsin has gone further, and asserts the doctrine that the *title* of the owner of such a lot extends to the centre of the stream, subject to the easement of the public in its use for navigation, and that he may, construct "docks or landing places for goods and passengers, taking care that vessels employed in navigating the stream are not impeded in their passage nor prevented from the use of all parts of the stream which are navigable."

And Mr. Justice Miller further adds on the same page:

"This riparian right is property and is valuable, and though it must be enjoyed in due subjection to the rights of the public, it can not be arbitrarily or capriciously destroyed or injured. It is a right which when once vested, the owner can only be deprived in accordance with established law, and if necessary for the public good, upon due compensation."

The freedom of any obstruction on his shore, is the valuable right this plaintiff possesses under the peculiar circumstances of this case. If one man builds a wharf on land under navigable water, which may not be taken away without compensation, another, the chief value of his property being, *not* to have a wharf or any obstruction, should assuredly not have his property destroyed without any redress or compensation.

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In the Supreme Court of the United States.

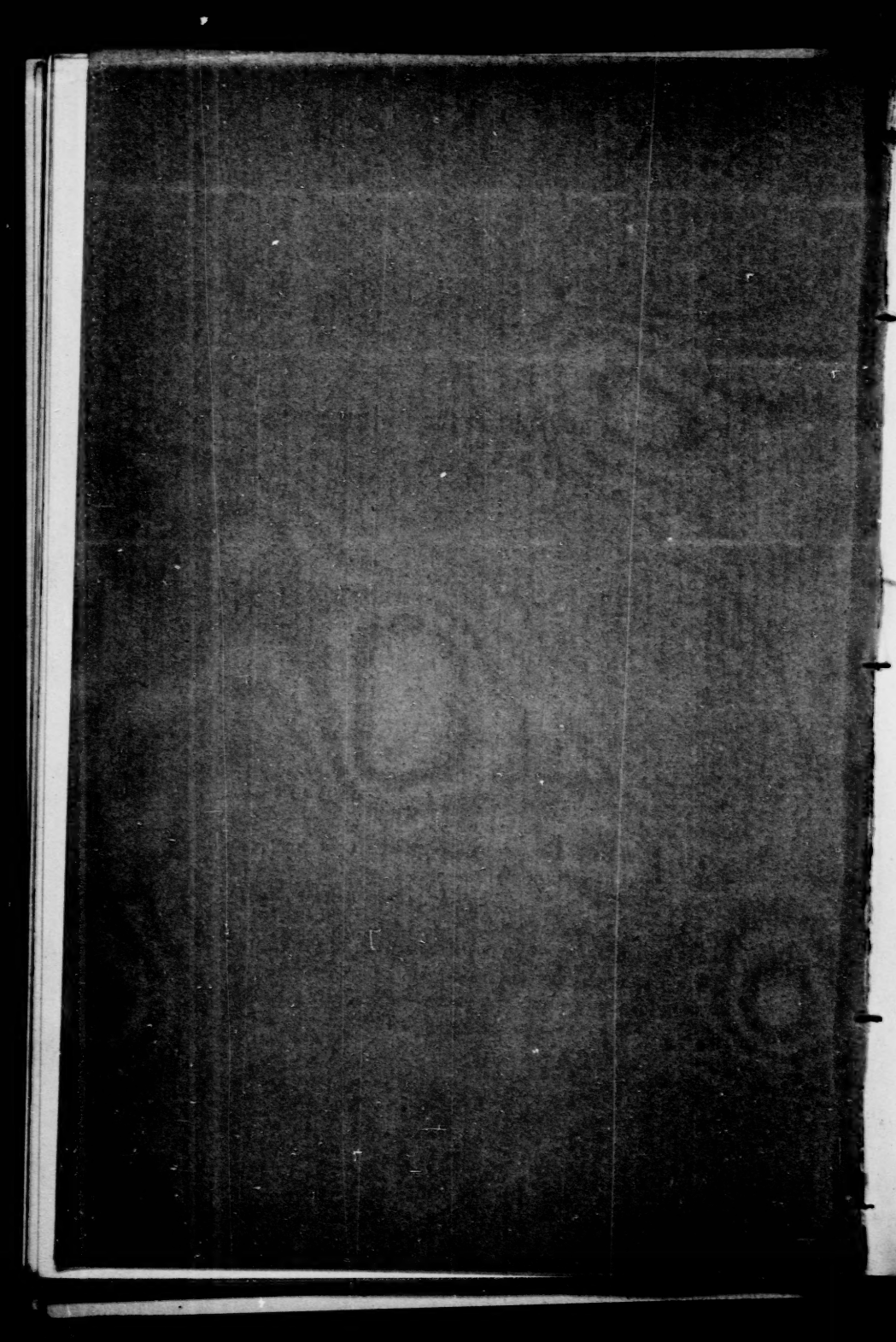
OCTOBER TERM, 1892.

NICHOLAS S. HILL
vs.
THE UNITED STATES. } No. 108.

ERROR TO THE CIRCUIT COURT FOR MARYLAND.

BRIEF FOR DEFENDANT IN ERROR.

W. H. H. MILLER,
Attorney-General.



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The plaintiff's brief sets forth the facts of this case, and shows that the ground of his complaint is that by erecting a light-house upon submerged land in front of his fast land the United States has deprived him of his "exclusive right of making improvements into the waters in front of his land," a right accruing to him under a general statute of Maryland of 1862.

He contends that while power was given to the United States in the commercial clause of the Constitution to erect light-houses along the shores of navigable waters, being highways of interstate or international commerce,

upon such submerged lands, yet Maryland reserved to herself and gave to him in 1862 the right he claims to have been interfered with by the erection of the light-house in question. He says that what Maryland gave up in the commercial clause was not ownership, or even an easement, but something different; namely, the right of control over light-houses, the right to say where and in what manner they should be placed, and to erect them; this being only the jurisdiction inherent in every sovereignty.

In answer it may be said: (1) The commercial clause has been held by this court to give to the United States, as to navigation and the improvement thereof, "all the powers which existed in the States before the adoption of the Constitution." (*Gilman* v. *Philadelphia*, 3 Wall., 724; *Martin* vs. *Waddell*, 16 Pet., 410; *McCready* vs. *Virginia*, 94 U. S., 391.) The court of appeals of Maryland has held the same. (*Day* vs. *Day*, 22 Md., 537.) After a long series of sweeping decisions and opinions to this effect, it has remained to the plaintiff to suggest a qualification of the powers granted. He says what was granted embraced jurisdiction plenary and exclusive, but no title or easement. For this distinction he quotes no authority and gives no reason, unless it be a reason that this court has held that the submerged lands were reserved to the States.

But land as in which an easement is given is usually reserved to the grantor. Plaintiff should point out evidence of an intention on the part of the State not to part with her right or title, or an easement useful in the carrying out of the public function of improving navigation,

or he should show that, applying to the transfer of the power in question appropriate rules of construction, it can not be fairly construed to convey such title or easement. He does not attempt to do either. This right to use at discretion the beds of navigable streams for all purposes of navigation without compensation has always been asserted by the United States Government. (15 *Opin. Attys. Genl.*, 47; 16 *Opin. Attys. Genl.*, 535; *Stocton* vs. *B. & O., &c.*, 32 Fed. Rep., 19.)

2. The submerged land belonged to the State, and was useful and used and intended to be used for light-houses and other aids to navigation. It was held by her in her sovereign capacity, as she held the jurisdiction over it said to have been granted. In convention assembled, as sovereign, the power over navigation, including the power to erect light-houses wherever it might seem useful, was by the State given to the Federal Government. "All the powers" which she had she gave. After this grant it is admitted that she had no power (except by Congressional sufferance) to erect light-houses or otherwise use her own submerged lands for the improvement of navigation.

It would seem that so much of her title to the submerged lands as she thus debarred herself from exerting was gone from her; for "title is that whereby a man cometh into the just possession of his own," and that whereby formerly she could have come into the just possession of this site or its use and occupation was gone. Some threads of her title were no longer in her hands. What, being carved out and given away, is called an easement, was no longer left in her title. Now, if this part

of title was lost to her, was it destroyed? If so, how was it annihilated? The granting of the power did not purport to be anything but a transfer. We must choose between the belief that the grant of power annihilated or transferred this part of her title. But, as a grant does not usually operate to destroy, it is natural to conclude that what was lost to the grantor was gained by the grantee. In the language of this court in regard to another power, "when the power * * * was surrendered to Congress it was a complete power, and the grant carried with it the right to exercise all the powers which made that power effective." (*In re* Rapier, Lottery, 143 U. S. R., 134.)

3. As to the intention of the State with regard to this part of her title, it is easy to believe that she intended the Federal Government to have and enjoy what was thus lost to her, namely, the title to her submerged lands so far as it was useful to have this in the work of improving navigation. The improvement of navigation did not lose its importance to her, and while there would be no motive for an intention to withhold a title she could no longer exert, there were many reasons for transferring it. But perhaps we are hasty in saying there could be no possible motive for withholding it—the plaintiff has discovered a use, and, we believe, the sole use to which it can be put, namely, to furnish a subject for sale to the Federal Government by the State or its grantees.

This, however, was not the spirit of that grant of power. The grant was not to a stranger, but to the fund of a partnership, to be used for the common advantage of the

granting States. The light-houses to be erected along the shores of Maryland, the improvement of her avenues of commerce, the enjoyment of all the navigable waters throughout the Union—this was compensation, and she never intended to ask any other.

4. But suppose it true that the right given by Maryland was only a jurisdictional one. It was a present, complete right, from the moment of the adoption of the Constitution. It was a right affecting all the submerged lands of Maryland, a right to erect light-houses upon them. Now, individual property is no more subject to an easement granted out of it than it is to any and all public jurisdictional rights. In the hands of Maryland or of her grantees, this property has always been subject, if you will, to this public jurisdictional right of the Federal Government, and unless two things can subsist at the same time in the same place, this is fatal to the pretended exclusive right of the plaintiff to erect improvements.

5. But is it necessary to suppose that in giving by a general statute to all riparian owners the exclusive right to make improvements on the waters in front of their lands, the legislature of Maryland intended anything more than to do away with an old practice of the State to grant patents to individuals in front of the shores of other individuals, to the great vexation and detriment of these latter? Such laws as this of 1862 are to be construed strictly in favor of the public, and the construction of the plaintiff would make this law give up the right of Maryland to erect such light-houses (Congress assenting) upon these submerged lands, which still belong to her. The law

intended to exclude the improvements of individuals for private purposes and not to exclude the State desiring to exercise her public functions. This is the meaning and therefore the law, and so the plaintiff never got the right he claims.

6. But had the legislature of Maryland expressly surrendered or even impaired the right of the State or her successor and *quasi* agent, the Federal Government, to erect light-houses the act would have been simply void. No legislature has any such power. It may exercise, but must not diminish, the public rights. (Lake-Front case, present term.)

7. In conclusion, our conception of the matter is simply this:

Whatever was necessary or advantageous to the State in improving navigation, whether jurisdiction, easement, or other thing, was intended to be at the disposal of the Federal Government. This Government was not an outsider, but, in part, the State itself; it was asked to assume all the responsibility of Maryland in regard to the navigation of her own bays and rivers, and was to have all the facilities for meeting that responsibility as fully as Maryland had them; in short, the same public objects were to be accomplished by the same public rights and titles for the benefit of the same citizens of Maryland as before.

If authority is desired to support propositions so plain as those underlying the Government's position in this case, plaintiff's brief furnishes such decisions in abundance. (*Wisconsin* vs. *Duluth*, 96 U. S. R., 379; *South Carolina*

vs. *Georgia*, 93 U. S. R., 4; *Gibbons* vs. *Ogden*, 9 Wheat., 190; *Mobile* vs. *Kimball*, 102 U. S. R., 691; *Hoboken* vs. *Pa. R. R. Co.*, 124 U. S. R., 656; *Willamette, etc.*, vs. *Hatch*, 125 U. S. R., 12.)

The action of the circuit court should be affirmed.

W. H. H. MILLER,
Attorney-General.